

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)

METROPOLITAN MORTGAGE &
SECURITIES CO., INC.)

DOCKET NO. 2006-0137

For Sale of Membership Interest in)
Mokuleia Water, LLC, to North Shore)
Water Company, LLC.)

DECISION AND ORDER NO. 23471

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Filed May 31, 2007

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_____)

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ORDER

By this Decision and Order, the commission conditionally approves METROPOLITAN MORTGAGE & SECURITIES CO., INC. ("Metropolitan") and NORTH SHORE WATER COMPANY, LLC's ("NSWC") (collectively, "Applicants") request to sell and transfer the applicable water facilities assets of Mokuleia Water, LLC ("MWL") to NSWC ("Proposed Transfer"), subject to the conditions and limitations set forth herein.

I.

Background

A.

Docket No. 05-0009

MWL is a Hawaii limited liability company. In July 2002, it obtained a water gathering and transmission system on the mountain side of Farrington Highway and a water distribution system that serves approximately 50 residences in the Mokuleia area through a permit allowing it to draw water from a potable well on the Dillingham Ranch property (hereafter

referred to as the "Water System"). MWL does not hold a commission issued certificate of public convenience and necessity ("CPCN") to operate as a public utility.

By Notice of Violation, Order to Show Cause, and Notice of Hearing issued on January 7, 2005, in Docket No. 05-0009, the commission began a proceeding to determine whether MWL and the Mokuleia Water Users Association ("Association") should be assessed a civil penalty for failure to comply with the requirements of Hawaii Revised Statutes ("HRS") Chapter 269. In Decision and Order No. 22214, filed on January 11, 2006, in Docket No. 05-0009 ("Decision and Order No. 22214") the commission, among other things:

1. Determined that MWL is a public utility, as defined by HRS § 269-1;
2. Required MWL to apply for a CPCN to provide water service to its customers, pursuant to HRS § 269-7.5, within 120 days of the filing of decision and order;
3. Determined that MWL's transfer of the Water System to the Association through certain agreements dated July 3, 2003, violated HRS § 269-19 and was void; and
4. Ordered Metropolitan to obtain prior commission approval pursuant to HRS § 269-19 if it desired to sell its membership interest in or the assets of MWL.

On January 20, 2006, MWL filed a motion for reconsideration of Decision and Order No. 22214 and then filed a motion for stay of that order on January 26, 2006. Subsequently, on May 23, 2006, MWL filed an application for interim stay of Decision and Order No. 22214, in which it stated that Metropolitan had filed an application with the commission in this docket, to transfer its assets or interests in MWL to NSWC. Furthermore, on June 15, 2006, MWL filed another motion for stay of Decision and Order No. 22214, requesting that the commission stay for a period of 24-months the requirement that MWL apply for a CPCN within 120 days of the filing of Decision and Order No. 22214.

By Order No. 22857, filed on September 15, 2006, in Docket No. 05-0009, the commission granted MWL's June 15, 2006 motion for stay ("Order No. 22857").¹ Additionally, the commission stayed the proceedings of Docket No. 05-0009 for a period of 24-months pending negotiations with the Board of Water Supply ("BWS") for the provision of water service to MWL's service area, subject to specific conditions (the "Stay"), and expressly reserved the commission's right, at its discretion, to lift the Stay at any time, should circumstances warrant such action to protect the interests of ratepayers and the general public.

¹In Order No. 22857, the commission clarified that it was addressing MWL's motion for stay filed on June 15, 2006 "which supersedes its motion for stay filed on January 26, 2006, and supplements and, where appropriate, supersedes its application for interim stay of Decision and Order No. 22214, but does not render a decision on" MWL's motion for reconsideration, filed on January 20, 2006. See Order No. 22857 at 7.

B.

Application

Metropolitan is a Washington corporation which owns 100% of the sole membership interest in MWL. Metropolitan was incorporated in 1979 and is licensed to conduct business in the State of Hawaii ("State").² In July 2002, Metropolitan through MWL acquired the Water System operating in the Mokuleia area from Sankyo Tsusho Co., Ltd. ("Sankyo"), through an intermediary company, Malani, Inc. ("Malani").³ On February 4, 2004, Metropolitan voluntarily petitioned the United States Bankruptcy Court in the Eastern District of Washington ("Bankruptcy Court") for relief under Chapter 11 of the U.S. Bankruptcy Code.

NSWC is a limited liability company. Its sole member is Dillingham Ranch Aina LLC ("DRA"), a Delaware limited liability company. In May 2006, DRA purchased the former Dillingham Ranch property from Western United Life Assurance Company ("WULA"),⁴ upon which the water well used by MWL to provide water service in the Mokuleia area is located. DRA is affiliated with Kennedy Wilson, Inc., an international real estate services and investment firm.

²See DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS's ("Consumer Advocate") Statement of Position filed on November 30, 2006, at 2.

³Additional details regarding Sankyo's ownership and the transfer of the water system through Malani to MWL, which is ultimately owned by Metropolitan, is set forth in Decision and Order No. 22214.

⁴WULA had obtained the property from Metropolitan on December 29, 2002.

By application filed on May 23, 2006, and amended on June 8, 2006,⁵ Metropolitan and NSWC request that the commission: (1) approve the sale and transfer of 100% of the membership interest currently owned by Metropolitan, or in the alternative, the applicable water facilities assets of MWL to NSWC; (2) approve the Limited Liability Company Interest Purchase and Sale Agreement dated October 24, 2005, as amended (the "Purchase Agreement")⁶; and (3) "approve and/or confirm" that following the close of the Proposed Transfer, NSWC shall own and control 100% of the membership interest in MWL or its assets, as applicable. The Application was filed pursuant to HRS § 269-19 and HAR Chapter 6-61, Subchapters 6 and 10.

Thereafter, Applicants informed the commission through their responses to the Consumer Advocate's information requests that since the filing of the Application they had agreed to structure the proposed transaction as an "asset purchase" and not

⁵Application for Interim Approval of Sale of Membership Interest in Mokuleia Water, LLC, to North Shore Water Company, LLC; Attachments A - E; Verification; and Certificate of Service, filed on May 23, 2006 (collectively, "Interim Application"); Application for Approval of Sale of Membership Interest of, or in the Alternative, the Applicable Water Facilities Assets in, Mokuleia Water, LLC to North Shore Water Company LLC; Verifications; and Certificate of Service, on June 8, 2006 (collectively, "Application"). In its Application, Applicants incorporate by reference the Interim Application, pursuant to HAR § 6-61-76. See Application at 2 n.1.

Copies of the Application were served on the Consumer Advocate, an ex officio party to this proceeding. See HRS § 269-51; Hawaii Administrative Rules ("HAR") § 6-61-62.

⁶While Applicants contend that a copy of the Purchase Agreement is attached as "Exhibit A" to the June 8, 2006 Application, no such exhibit was attached to the Application. See Application at 1. However, a copy of the proposed Purchase Agreement was attached as "Exhibit D" to the Interim Application.

as a sale of membership interests.⁷ This decision to go forward as a purchase of assets as opposed to a sale of membership interests is contemplated within the parameters of the proposed transfer, as described in the Application.

In their Application, Applicants contend that the underlying reason for the Proposed Transfer is Metropolitan's current financial position. After filing its petition with the Bankruptcy Court in 2004, on October 24, 2005, Metropolitan entered into the Purchase Agreement with NSWC, which allows NSWC to acquire MWL for \$100,000.⁸ According to Applicants, in February 2006, the Bankruptcy Court issued an order requiring the transfer of ownership and control of nearly all of Metropolitan's assets (aside from MWL), to a creditor's trust for liquidation and distribution to Metropolitan's creditors. This action, Applicants represent, "essentially removed any ability by Metropolitan to provide funding for MWL[.]"⁹ Due to its lack of resources to pay for the costs of the Water System, Metropolitan informed certain parties that it would be unable to continue providing water service to its existing customers after May 31, 2006. This disclosure resulted in NSWC and MWL entering into a Water Facilities Management Agreement ("Water Agreement"), effective May 19, 2006. Under the Water Agreement, NSWC would manage and operate MWL's water facility on an interim basis until NSWC completes the Proposed Transfer.

⁷See Metropolitan's response to CA-IR-1 filed on October 30, 2006.

⁸See Application at 4.

⁹Id. at 5.

Applicants state that one of the key elements to the Proposed Transfer is NSWC and its affiliates' desire to resolve the long pending dispute over the water facility serving the Mokuleia area. According to Applicants, all parties recognize the long term benefits of having the BWS supply water to the users in the area, eliminating the need for MWL to continue providing service. Due to the recent purchase of the Dillingham Ranch lands by DRA and matters related to the Proposed Transfer, Applicants further represent that NSWC and its affiliates are willing to participate with the BWS and a Mokuleia community association in the planning and implementation of the extension of the BWS water line from its current terminus at the Kaena North Subdivision to MWL's bulk water meter, approximately 2,000 linear feet down Farrington Highway in the direction of Kaena Point.

In support of their request, Applicants represent that NSWC is "sufficiently fit, willing and able to continue to provide service to the existing Mokuleia water users currently receiving water service from MWL, and that the subject transaction is reasonable and in the public interest."¹⁰

In particular, according to Applicants, NSWC is funding the Proposed Transfer through internal funds from its affiliates. Applicants further contend that, if commission approval is granted, NSWC has or will have the financial fitness to fund the continuing operations of MWL through internal resources and revenues generated from water operations. NSWC's willingness to

¹⁰Id. at 7.

assume responsibility for the management of the Water System is evident from the time, effort, and funds (both expended and anticipated to be expended) to negotiate the Purchase Agreement and the Water Agreement and to file the Application herein. Moreover, Applicants state that the operations of the water company will not be adversely affected by the Proposed Transfer since, Aqua Engineers, Inc. ("Aqua Engineers"), the current contractor, will continue to be retained to monitor and test the water, provide 24/7 emergency contact, pursuant to an existing contract, and will conduct repairs, as necessary, on a time and material basis. Through the continued retention of Aqua Engineers, Applicants state that the operations of the Water System will continue uninterrupted, and, thus, there should not be a "transition period" resulting from the Proposed Transfer, and that current water users should be assured a continued supply of water.

Applicants contend that the Proposed Transfer is reasonable and in the public interest since it would provide financial stability and the continued operations and maintenance of the Water System. Applicants also represent that approval of the Proposed Transfer would provide existing water users with an opportunity to obtain water service from the BWS. Furthermore, NSWC and its affiliates are, according to Applicants, committed to participating with the BWS to extend the BWS line to the Mokuleia community, and NSWC will continue to operate and maintain the existing facilities (up to the Farrington Highway bulk water meter) necessary for the continued

operations of the water company through funds generated from water operations and internal resources.

C.

Consumer Advocate's Statement of Position

On November 30, 2006, the Consumer Advocate filed its Statement of Position in this docket ("CA's Statement of Position") informing the commission that it does not object to approval of the Application, provided that the commission adopts certain conditions.

As an initial matter, the Consumer Advocate states that it does not address the issue of whether MWL and NSWC should be required to obtain a CPCN before approval of the Proposed Transfer and, similarly, will not object to approval of the Proposed Transfer even though both MWL and NSWC lack a CPCN. Its position on these matters recognizes the commission's decision in Order No. 22857, which allowed the parties to focus on completing the necessary improvements to the existing Water System and the need to ensure the continued provision of water service in the area.¹¹

The Consumer Advocate states that the Proposed Transfer appears to be in the public interest. According to the Consumer Advocate, Metropolitan is in bankruptcy and it appears that "if the facilities are not allowed to be acquired by NSW[C]

¹¹However, the Consumer Advocate states that its position is limited to this proceeding and should not be construed to reflect a policy that would support similar efforts by entities that have not yet obtained a CPCN.

and remain with MW[L], under the ownership of . . . Metropolitan, there will be no available funds to continue operating and maintaining the facilities."¹² The Consumer Advocate further contends that: (1) the Water System is not yet up to BWS standards; (2) the BWS expects the improvements to be completed before taking ownership of the system; and (3) "[i]f the [P]roposed [T]ransfer of the water facilities is not approved current Water System users will not be able to receive water services."¹³ The Consumer Advocate states that it would normally require the acquiring company to demonstrate its fitness, ability, and willingness to provide utility service since service under new management may result in customers receiving unacceptable levels of service. In this case, however, the Consumer Advocate asserts that it would forego that analysis, provided that certain conditions are met.

Among the conditions requested by the Consumer Advocate are that the rates to be charged to customers should be no more than the BWS rates that were effective as of October 1, 2006, and that those rates remain unchanged, unless approval is sought from the commission under the provisions of HRS § 269-16 and any other applicable statutes. According to the Consumer Advocate, Applicants are incorrect in their belief that MWL and NSWC are entitled to implement increases in charges, without abiding by the requirements of HRS § 269-16, as long as such increases are consistent with the BWS rates. While Order No. 22857 does state

¹²See CA's Statement of Position at 9.

¹³Id.

that MWL (or NSWC, if the Application is approved) may charge standard BWS rates during the Stay, there is no specific language in Order No. 22857 indicating that HRS § 269-16 is waived or that NSWC or MWL are somehow exempt from complying with HRS § 269-16 during the Stay. The Consumer Advocate argues that "[a]llowing MW[L] and NSW[C] to increase its rates, even if only up to BWS rates, without following the requirements of HRS § 269-16 does not protect ratepayers' interests."¹⁴ Additionally, the Consumer Advocate contends that there is no evidence in the record to support the reasonableness of the existing rates. While it "acknowledges the situation in the area and the need to continue water provision in the area, which most likely gave rise to the departure from past precedent and the statutory requirements of HRS § 269-16 . . . [the Consumer Advocate argues] that the setting of initial rates at BWS levels should not be extended to the rate increases which the BWS intends to implement."¹⁵ Thus, the Consumer Advocate asserts that the commission should not allow MWL or NSWC to implement rate increases during the Stay unless they can justify the increases.

In sum, the Consumer Advocate represents that it will not object to the Proposed Transfer since: (1) to ensure that the Mokuleia area is provided continued water service, the transfer of the Water System assets from MWL and Metropolitan (who is currently in bankruptcy proceedings) to NSWC is reasonable; and (2) approving the Proposed Transfer will allow

¹⁴Id. at 11.

¹⁵Id. at 13.

the continued progress of the current efforts to transfer the Water System to the BWS. Nonetheless, the Consumer Advocate's position is subject to the commission adopting the following seven conditions (collectively, "Recommended Conditions"):

1. NSWC and/or its affiliates must confirm that it is willing and able to provide the funding necessary to continue operations and maintenance of the system until the system is successfully transferred to the BWS, or until some entity assumes ownership of the system and obtains a CPCN to provide public utility water service in the Mokuleia area.
2. NSWC and/or its affiliates must confirm that it is willing and able to provide the funding necessary to upgrade or improve the system to meet BWS standards such that the proposed transfer of the system to the BWS can proceed.
3. NSWC and/or its affiliates must provide the financial statements that were supposed to be provided in response to CA-IR-12 to demonstrate the Company's financial ability to meet the requirements of the above two conditions. In the event the financial statements do not clearly support the ability to meet the two above conditions, NSWC and/or its affiliates must explain and demonstrate that it has access to funds to allow the above conditions to be met.
4. The rates to be charged to customers should be no more than the BWS rates that were effective as of October 1, 2006.
5. The rates charged by MWL or NSWC shall remain unchanged, unless approval is sought from the commission under the provisions of HRS § 269-16 and any other applicable statutes or HAR to charge a different rate, or a waiver is sought and approved by the commission to implement a rate increase without following the applicable statutes and rules.
6. Along with the quarterly reporting requirements set forth in Order No. 22857, a statement of income or profit and loss should be filed that reflects the revenues collected

as compared to the expenses that are recorded during that quarterly period.

7. The discussion in the quarterly report, if not already intended, should include a discussion of the progress made to ensure that all existing customers in the area receive water service, and a statement as to whether that service will be provided by BWS or through some other entity.

D.

Applicants' Response

On December 7, 2006, Applicants¹⁶ filed a Response to the Division of Consumer Advocacy's Statement of Position ("Applicants' Response"). In their Response, Applicants agree to Recommended Condition No. 1 stating that NSWC intends to repair and maintain the Water System until BWS service is connected or until NSWC obtains a CPCN if BWS service is not brought to the area within the Stay period.

In connection with Recommended Condition No. 2, Applicants state that this condition raises certain questions regarding what constitutes the "system" which NSWC is obligated to upgrade and whether this condition imposes a greater obligation on NSWC than it had previously committed to. Applicants clarify that the Proposed Transfer does not include facilities which MWL does not own or have clear title to, including the transmission lines under Farrington Highway and connected to MWL's bulk water meter that provide service to users

¹⁶For clarity, the commission notes that Applicants' Response was filed on behalf of MWL, Metropolitan, and NSWC and collectively referred to all three as "Applicants". See Applicants' Response at 1. However, "Applicants" as set forth herein refer to Metropolitan and NSWC as first reflected in the Application filed on June 8, 2006. See Application at 1.

along Farrington Highway. Applicants note that those lines have never belonged to MWL and were never subject to any license or easement in favor of MWL or its predecessor and, thus, those particular lines are not being transferred under the terms of the Proposed Transfer. Applicants assert that since those "water lines beyond the current bulk meter do not legally belong to MWL, NSW[C] never intended, nor gave any indication, that it would upgrade the distribution lines."¹⁷ Nonetheless, Applicants represent that NSWC "has been investigating the feasibility of having the BWS line extended beyond the bulk meter location to a location that would provide direct BWS service to Camp Mokuleia, the MWL customer that has the furthest connection to the existing water system."¹⁸ However, due to the significant capital outlays required for this scenario, NSWC is exploring all avenues to determine whether government and other major landowners in the area would be interested in jointly extending the BWS line to that location.

With regards to Recommended Condition No. 3, Applicants note that they were negotiating a stipulated protective order with the Consumer Advocate, and that upon issuance of the protective order governing confidential information in this docket, they would file the requested financial statements with the commission and the Consumer Advocate. Moreover, in response to the Consumer Advocate's suggestion that NSWC may be recovering the costs incurred to upgrade the system through non-regulated

¹⁷See Applicants' Response at 4.

¹⁸Id. at 4-5.

transactions (such as the sale of real estate in the area), Applicants note that NSWC has indicated during various discussion that the DRA lands to be developed in the future will be served by a separate private water system.

Concerning Recommended Condition Nos. 4 and 5, Applicants argue that NSWC should not be required to file a rate case pursuant to HRS § 269-16 to increase its rates within the Stay period. While agreeing that HRS § 269-16 requirements apply when a public utility seeks to increase its regulated rates, Applicants state that "such requirements should not apply in this particular limited circumstance."¹⁹ Among other things, Applicants contend that in Docket No. 05-0009, NSWC stated that its limited resources would be better served towards the BWS line extension as opposed to complying with requirements related to public utility regulation. Thus, MWL and NSWC committed to charging its customers the standard BWS rates during the duration of the Stay. Applicants also contend that due to the relatively short period of time the Stay is in effect and due to the timing²⁰ and complexities of rate cases, NSWC would need to carefully evaluate whether pursuing a rate increase would be feasible. Accordingly, Applicants assert that, in this limited circumstance, the commission should allow MWL or NSWC to continue charging their customers the standard BWS rates including the

¹⁹Id. at 6.

²⁰Applicants contend that "any rate relief granted would be short lived and there may not be sufficient time to recover any increased revenues before BWS would begin providing service." See Applicants' Response at 7 (footnote omitted).

annual increases already approved by the City and County of Honolulu.

II.

Discussion

At the outset, the commission recognizes that MWL and NSWC do not hold CPCNs to operate as public utilities. In Order No. 22857, however, the commission approved a 24-month stay of its requirement that MWL apply for a CPCN pending negotiations with the BWS for the provision of water service to MWL's service area. The commission also allowed MWL (or NSWC, if the Application is approved) to charge standard BWS rates during the Stay. In addition, in Decision and Order No. 22214, the commission ordered Metropolitan to obtain prior commission approval pursuant to HRS § 269-19 if it desired to sell its membership interest in or the assets of MWL.

These orders arose out of a particularly difficult set of circumstances. The commission was cognizant of the need to provide continued water service in the area, Metropolitan's bankruptcy, Metropolitan's lack of available funds to continue providing service, the efforts to have BWS supply water to the area, and the cost of regulation. Those factors and circumstances continue to be present here. Accordingly, while the commission is very concerned, it sees little choice in these circumstances, but to review the Application even though neither MWL nor NSWC have CPCNs. In doing so, the commission makes clear that it does so given these particular circumstances, and such

decision is limited to this particular case and should not be construed as establishing a commission policy that would allow entities that have not yet received a CPCN under the requirements of HRS § 269-7.5 to seek a transfer of public utility assets prior to obtaining a CPCN.

A.

Proposed Transfer

With respect to the Proposed Transfer, the commission notes that it is vested with broad powers to review the transfer of Metropolitan's water facilities assets to NSWC. Specifically, HRS § 269-19 states:

No public utility corporation shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its road, line, plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit, or any right thereunder, nor by any means, directly or indirectly, merge or consolidate with any other public utility corporation without first having secured from the public utilities commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger, or consolidation, made other than in accordance with the order of the commission shall be void.

HRS § 269-19 (emphasis added).

HRS § 269-7(a) states, in relevant part:

The public utilities commission . . . shall have power to examine into the condition of each public utility, the manner in which it is operated with reference . . . the issuance by it of stocks and bonds, and the disposition of the proceeds thereof, the amount and disposition of its income, and all its financial transactions, its business relations with other persons, companies, or corporations, its compliance with all applicable state and federal laws and with the provisions of

its franchise, charter, and articles of association, if any, its classifications, rules, regulations, practices, and service, and all matters of every nature affecting the relations and transactions between it and the public or persons or corporations.

HRS § 269-7(a).

Here, the Proposed Transfer appears to be reasonable and consistent with the public interest. In particular, as noted above, Metropolitan has filed a Chapter 11 proceeding in the Bankruptcy Court; and is unable to continue funding, operating, and managing the Water System. In addition, there is a continued need for water service in the Mokuleia area; and NSWC and its affiliates appear committed to work towards having the BWS provide water service. Moreover, the continued retention of Aqua Engineers, the current Water System operator, should help to ensure sustained water service in the area with minimum adverse impact on users, until BWS service can be established. Additionally, NSWC's sole member, DRA, recently purchased the Dillingham Ranch property located in the area, and thus, has a vested interest in the development of the area which logically would include the provision of reliable and continued water service. Moreover, NSWC's affiliates have committed to financially supporting NSWC through internal funds and NSWC has willingly assumed responsibility for the management of the Water System and the transition towards the provision of water service by the BWS. Finally, the commission is persuaded by the Consumer Advocate's position with regards to the Proposed Transfer and its Recommended Conditions, which are discussed in the section below.

Based on the above, the commission concludes that the Proposed Transfer should be approved. However, commission approval of the Proposed Transfer is conditioned on NSWC and its affiliates' adherence to and acceptance of the conditions described below. Moreover, to the extent that it effectuates the Proposed Transfer and does not conflict with any commission requirements set forth herein and in Docket No. 05-0009, the commission concludes that the Purchase Agreement should also be approved, subject to the conditions described below.

B.

Conditions of Approval

The Consumer Advocate recommends that approval of the Proposed Transfer be conditioned on its seven Recommended Conditions, all of which, as discussed below, appear to be appropriate under the circumstances and consistent with protecting the interests of the public.

1.

Condition No. 1

First, the Consumer Advocate recommends that:

NSWC and/or its affiliates must confirm that it is willing and able to provide the funding necessary to continue operations and maintenance of the system until the system is successfully transferred to the BWS, or until some entity assumes ownership of the system and obtains a CPCN to provide public utility water service in the Mokuleia area.

As noted above, Applicants agree to this condition stating that NSWC intends to repair and maintain the Water System

until BWS service is connected or until NSWC obtains a CPCN if BWS service is not brought to the area within the Stay period.²¹ Accordingly, the commission adopts the Consumer Advocate's Recommended Condition No. 1.

2.

Condition No. 2

For its second condition, the Consumer Advocate recommends the following:

NSWC and/or its affiliates must confirm that it is willing and able to provide the funding necessary to upgrade or improve the system to meet BWS standards such that the proposed transfer of the system to the BWS can proceed.

With regard to Recommended Condition No. 2, Applicants clarify in Section II.B.1 of their Response that the Proposed Transfer does not include transmission facilities which MWL does not own or have clear title to including lines under Farrington Highway and connected to MWL's bulk water meter. Applicants, however, state that they have been investigating the feasibility of extending the BWS line beyond the bulk water meter location to a location that would provide BWS service to Camp Mokuleia, the MWL customer that has the furthest connection to the existing Water System. The commission understands Applicants' position as expressed in Section II.B.1 of Applicants' Response. However, the commission believes Recommended Condition No. 2 to still be reasonable since it basically reiterates Applicants' representations set forth in

²¹See Applicant's Response at 2-3.

this docket and is consistent with the reasons for which the commission approved the Stay in Docket No. 05-0009. However, the commission believes that Recommended Condition No. 2 should be subject to the clarifications and representations set forth in Section II.B.1 of Applicants' Response.

3.

Condition No. 3

For its third condition, the Consumer Advocate recommends that:

NSWC and/or its affiliates must provide the financial statements that were supposed to be provided in response to CA-IR-12 to demonstrate the Company's financial ability to meet the requirements of the above two conditions. In the event the financial statements do not clearly support the ability to meet the two above conditions, NSWC and/or its affiliates must explain and demonstrate that it has access to funds to allow the above conditions to be met.

On January 12, 2007, Applicants filed financial statements to supplement their response to CA-IR-12.a.1. Applicants' supplemental response was filed under Protective Order No. 23139, which was issued by the commission on December 14, 2006. Accordingly, it appears that Recommended Condition No. 3, which essentially requires the filing of financial statements in response to CA-IR-12, is moot and, thus, not necessary.

Condition Nos. 4 and 5

For its fourth and fifth conditions, the Consumer Advocate recommends:

The rates to be charged to customers should be no more than the BWS rates that were effective as of October 1, 2006.

The rates charged by MWL or NSWC shall remain unchanged, unless approval is sought from the commission under the provisions of HRS § 269-16 and any other applicable statutes or HAR to charge a different rate, or a waiver is sought and approved by the commission to implement a rate increase without following the applicable statutes and rules.

In sum, the Consumer Advocate recommends that the rates for water service should be no more than the BWS rates effective as of October 1, 2006, and that these rates should remain unchanged unless the commission: (1) approves a request for a change in rates filed under HRS § 269-16 and other applicable requirements; or (2) grants a request for a waiver to implement the rate changes without following the applicable HRS and HAR provisions. Although the Consumer Advocate states that while it can comprehend why NSWC and MWL believe that they could increase rates to reflect the BWS rate increases under Order No. 22857, the Consumer Advocate states that there is no specific language in Order No. 22857 waiving the requirements of HRS § 269-16 or that MWL and NSWC are somehow exempt from the provisions of HRS § 269-16 during the Stay. Among other things, the Consumer Advocate also argues that: (1) there is no evidence to support the reasonableness of the current rates; (2) allowing MWL or NSWC, as applicable, to increase rates without adherence to

HRS § 269-16 does not protect the public's interest; and (3) the establishment of initial rates at BWS levels should not be extended to the rate increases the BWS intends to implement.

In response, Applicants argue that the requirements of HRS § 269-16 should not apply in this particular circumstance. Additionally, Applicants contend that since "any rate relief granted would be short lived and there may not be sufficient time to recover any increased revenues before BWS" service begins, NSWC would need to carefully evaluate whether applying for a rate increase under HRS § 269-16 would be feasible.²² Moreover, among other things, Applicants contend that the commission noted in Order No. 22857 that the costs associated with regulatory compliance, including completion of rate cases, can be significant and that rates charged by a public utility may well be in excess of those charged by the BWS due to the small number of ratepayers.

Here, the commission does not find Applicants' arguments persuasive. While the commission does recognize that the matters of this case (and Docket No. 05-0009) require unique solutions that necessitate some departure from certain provisions of HRS Chapter 269, implementation of rate increases without examination and analysis of the fairness of such increases, even if it is to reflect the BWS rates, would not be reasonable and in the public interest, and would be inconsistent with HRS § 269-16. While the commission in Order No. 22857 had conditioned its approval of the Stay on ratepayers not being charged more than

²²See Applicants' Response at 7.

the standard BWS rates, among other things, the order does not, as the Consumer Advocate points out, contain specific language waiving the HRS § 269-16 requirements or that MWL or NSWC, as applicable, would somehow be exempt from complying with HRS § 269-16 during the duration of the Stay. Additionally, Order No. 22857 does not specifically indicate that the BWS rate increases during the Stay would correspondingly apply to MWL or NSWC, as applicable. The commission agrees with the Consumer Advocate's contention that the "setting of initial rates at BWS levels should not be extended to the rate increases which the BWS intends to implement [in the future]".²³ Accordingly, the commission finds Recommended Condition Nos. 4 and 5 to be reasonable and appropriate under the circumstances and, thus, concludes that these conditions should be adopted.

5.

Condition Nos. 6 and 7

For its sixth and seventh conditions, the Consumer Advocate recommends:

Along with the quarterly reporting requirements set forth in Order No. 22857, a statement of income or profit and loss should be filed that reflects the revenues collected as compared to the expenses that are recorded during that quarterly period.

The discussion in the quarterly report, if not already intended, should include a discussion of the progress made to ensure that all existing customers in the area receive water service, and a statement as to

²³See CA's Statement of Position at 13.

whether that service will be provided by BWS or through some other entity.

Applicants do not object to these requirements. As the commission finds Recommended Condition Nos. 6 and 7 reasonable, the commission will also condition the Proposed Transfer on compliance with these conditions.

6.

Summary of Conditions

Based on the above, the commission concludes that its approval of the Proposed Transfer should be subject to NSWC and its affiliates' adherence to and acceptance of, as applicable, the following conditions:

- (A) NSWC and/or its affiliates must confirm that it is willing and able to provide the funding necessary to continue operations and maintenance of the system until the system is successfully transferred to the BWS, or until some entity assumes ownership of the system and obtains a CPCN to provide public utility water service in the Mokuleia area.
- (B) Subject to the clarifications and representations set forth in Section II.B.1 of Applicants' Response, NSWC and/or its affiliates must confirm that it is willing and able to provide the funding necessary to upgrade or improve the system to meet BWS standards such that the proposed transfer of the system to the BWS can proceed.
- (C) The rates to be charged to customers shall be no more than the BWS rates that were effective as of October 1, 2006.
- (D) The rates charged by MWL or NSWC shall remain unchanged, unless approval is sought from the commission under the provisions of HRS § 269-16 and any other applicable statutes or HAR to charge a different rate, or a waiver is sought and approved by the commission to

implement a rate increase without following the applicable statutes and rules.

- (E) Along with the quarterly reporting requirements set forth in Order No. 22857, a statement of income or profit and loss should be filed that reflects the revenues collected as compared to the expenses that are recorded during that quarterly period.
- (F) The discussion in the quarterly report, if not already intended, should include a discussion of the progress made to ensure that all existing customers in the area receive water service, and a statement as to whether that service will be provided by BWS or through some other entity.

Additionally, the commission makes clear that upon effectuation of the Proposed Transfer, the obligations and requirements imposed by the commission on MWL, and its service, under Metropolitan in Docket No. 05-0009, shall be transferred to and assumed by NSWC and its affiliates, as applicable.

III.

Orders

THE COMMISSION ORDERS:

1. The Proposed Transfer is approved, under HRS §§ 269-7(a) and 269-19, subject to the conditions set forth below. Within thirty days of the date of this Decision and Order, NSWC and/or its affiliates shall submit a filing evidencing their adherence to and express acceptance of, as applicable, the following conditions:

- (A) NSWC and/or its affiliates must confirm that it is willing and able to provide the funding necessary to continue operations and maintenance of the system until the system is successfully transferred to the BWS, or until some entity assumes ownership of the system

and obtains a CPCN to provide public utility water service in the Mokuleia area.

- (B) Subject to the clarifications and representations set forth in Section II.B.1 of Applicants' Response, NSWC and/or its affiliates must confirm that it is willing and able to provide the funding necessary to upgrade or improve the system to meet BWS standards such that the proposed transfer of the system to the BWS can proceed.
- (C) The rates to be charged to customers shall be no more than the BWS rates that were effective as of October 1, 2006.
- (D) The rates charged by MWL or NSWC shall remain unchanged, unless approval is sought from the commission under the provisions of HRS § 269-16 and any other applicable statutes or HAR to charge a different rate, or a waiver is sought and approved by the commission to implement a rate increase without following the applicable statutes and rules.
- (E) Along with the quarterly reporting requirements set forth in Order No. 22857, a statement of income or profit and loss should be filed that reflects the revenues collected as compared to the expenses that are recorded during that quarterly period.
- (F) The discussion in the quarterly report, if not already intended, should include a discussion of the progress made to ensure that all existing customers in the area receive water service, and a statement as to whether that service will be provided by BWS or through some other entity.

2. Upon effectuation of the Proposed Transfer, the obligations and requirements imposed by the commission on MWL, and its service under Metropolitan in Docket No. 05-0009, shall be transferred to and assumed by NSWC and its affiliates, as applicable.

3. Within a reasonable period of time after the closing of the Proposed Transfer, Applicants shall provide the

commission and the Consumer Advocate with written notice of the consummation of the subject transaction.

4. Applicants shall timely comply with all of the conditions and other requirements set forth above, as applicable. Failure to comply with any of these conditions and requirements may constitute cause to void this Decision and Order, and may result in further regulatory action, as authorized by State law and commission rules and regulations.

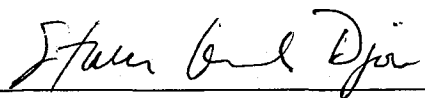
DONE at Honolulu, Hawaii MAY 31 2007.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By 
John E. Cole, Commissioner

APPROVED AS TO FORM:

for 
Ji Sook Kim
Commission Counsel

2006-0137.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23471 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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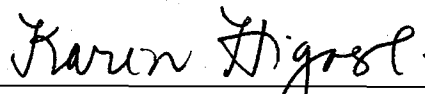
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DATED: MAY 31 2007